HEW YON MIN

v.

KANAGARATNAM SOMASUNDRAM

HIGH COURT MALAYA, IPOH
ANUAR ZAINAL ABIDIN J
[CIVIL REVISION NO. 4 OF 1984]
8 OCTOBER 1985

CIVIL PROCEDURE: *Judgment in default obtained against defendant - Appeal - Out of time - High Court granted defendant's application to file notice of appeal and stay of execution - Magistrate granted plaintiff leave to issue writ of seizure and sale against defendant - Application by defendant for committal order against Magistrate.*

The plaintiff obtained judgment in default against the defendant. The defendant filed his notice of appeal but due to errors in the form, the notice of appeal was returned to the defendant.

The defendant found that he was now out of time and applied to the High Court by way of revision to file his notice of appeal and for stay of execution.

The High Court allowed the defendant's application.

The Magistrate however granted the plaintiff leave to issue writ of seizure and sale against the defendant.

The defendant now applies for leave to issue an order of committal against the Magistrate for contempt of Court.

Held:

[1] The defendant's issue of application for committal proceedings against the Magistrate is dismissed as the defendant applicant had failed to serve a copy of the High Court order on the Magistrate or Magistrate's Court Tapah.

[2] The learned Magistrate has not committed any act in contempt of the Court.

[Application dismissed with costs.]

For the plaintiff - S.A. Lingam (Sharma with him)
For the defendant - Bachan; M/s. Bachan & Kartar

JUDGMENT

Anuar Zainal Abidin J:

This is an application by the applicant for leave to issue an order of committal against Encik Mohd. Nasfy bin Yasin, the learned Magistrate at Magistrate's Court, Tapah for contempt of Court.

For the purpose of this appeal, I think it is only necessary for me to state the facts very briefly.

The applicant is a defendant in a Magistrate's Court, Tapah summons no. 78/84. In that case, judgment in default was entered against the defendant. The defendant filed an appeal but the notice of appeal was sent back to the defendant by the learned Magistrate due to some errors in the form. Unfortunately, before the notice of appeal could be corrected, the

time for filing an appeal had already expired. The plaintiff in that case then took out execution proceeding against the defendant and as a result the defendant's property was attached. Because of the urgency of the matter, the defendant applied to High Court by way of revision to allow the defendant time to file his notice of appeal and also an order for stay of execution. The High Court on 11 September 1984 in exercise of its power of revision allowed the defendant 7 days to file the notice of appeal and also ordered for stay of execution.

Now on 29 October 1984, the learned Magistrate Tapah granted the plaintiff leave to issue writ of seizure and sale against the defendant.

The defendant contends that the learned Magistrate in granting the issue of the writ of seizure in the face of the High Court order for stay of execution has committed an act in contempt of Court. With respect the applicant's application for the committal order against the learned Magistrate failed to show that the learned Magistrate in the first place had actually been served with the order of Court ordering the stay of execution. From the many documents attached to the affidavit of the applicant, Hew Yon Min (encl. 13) dated 22 May 1985, I fail to find one which shows that the High Court Order had actually been sent to the Magistrate's Court, Tapah. I suspect that the applicant in his eagerness to effect the order had actually overlooked to send a copy of the order to the learned Magistrate or the Magistrate's Court, Tapah.

Without the valid order being served on the learned Magistrate or a copy sent to the Magistrate's Court at Tapah, the Magistrate is under no duty to comply with whatever order contained in the order. I think the learned Magistrate is within his jurisdiction to issue the writ of seizure. I do not think the learned Magistrate has committed any act in contempt of Court.

For the reasons above I would dismiss this application.

Also found at [1989] 1 CLJ 446